



Date Issued: March 9, 1999

Case No.: **1999-INA-23**

In the Matter of:

PASQUALE'S PIZZA & RESTAURANT
Employer,

On behalf of:

BERNARDO GRIGOLI,
Alien.

Appearance: Joseph M. Rollo
Attorney at Law
for Employer and Alien

Certifying Officer: Richard E. Panati
Philadelphia, PA

Before: Burke, Guill and Vittone
Administrative Law Judges

DECISION AND ORDER

Pasquale's Pizza & Restaurant (Employer) filed an application for labor certification¹ on behalf of Roberto Amata (Alien). (AF 32).² Employer, seeks to employ Alien as a Specialty Cook. *Id.* This case is before this Board to decide whether the requirements for the position offered are unduly restrictive in violation of C.F.R. § 656.21(b)(2). This decision is based on the records upon which the CO denied certification and Employer's request for review, as contained in the AF. 20 C.F.R. § 656.27(c).

¹Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

²"AF" is an abbreviation for "Appeal File."

The job duties of the position offered are:

Must be able to prepare a variety of dishes typical of Italian Regional Cuisine, including but not limited to certain selected veal, chicken selected veal, chicken and pasta dishes.

Id.

Employer also required two years of experience in the job offered. *Id.* Along with the application for Alien Labor Certification, Employer submitted its menu. (AF 39-40). The menu includes such items as pizza, hoagies, stromboli and calzones. *Id.*

On June 24, 1998, the Certifying Officer (CO) issued a Notice of Findings (NOF). The CO changed the Dictionary of Occupational Title (DOT) Code for the Alien Employment Application that Employer submitted from "Cook, Specialty, Foreign Food" to "Cook, Specialty". (AF 22a-22c). The CO found that Employer is a pizza and sandwich shop that serves very limited foreign cuisine, and that the foreign foods on Employer's menu did not appear to need extensive training to prepare and cook. *Id.* The DOT requires a "Cook, Specialty," to have 6 months to one year of combined education, training and experience. Since the CO reclassified the job position to "Specialty Cook", and Employer required two years of experience, the CO held that the experience requirement for the position application was unduly restrictive.

The DOT Code for Cook, Specialty reads as follows:

Prepares specialty foods, such as fish and chips, tacos, and pasties (Cornish meat pies) according to recipe and specific methods applicable to type of cookery. May serve customers at window counter. May prepare and serve beverages, such as coffee, clam nectar, and fountain drinks. May be required to exercise showmanship in preparation of food, such as flipping pancakes in air to turn or tossing pizza dough in air to lighten texture. May be designated according to food item prepared as Cook, Fish and Chips.

See DOT Code 313.361-026.

The DOT Code for Cook, Specialty, Foreign Food reads as follows:

Plans menus and cooks foreign-style dishes, dinners, desserts, and other foods, according to recipes; Prepares meats, soups, sauces, vegetables and other foods prior to cooking. Seasons and cooks food according to prescribed methods. Portions and garnishes food. Serves food to waiters on order. Estimates food consumptions and requisitions or purchases supplies. Usually employed in restaurant specializing in foreign cuisine, such as French, Scandinavian, Hungarian, and Cantonese. May be designated according to type of food specialty prepared as Cook, Chinese-Style Food (hotel & rest.); Cook, Italian-Style Food (hotel & rest.); Cook, Kosher-Style Food (hotel & rest.); Cook, Spanish-Style Food (hotel & rest.).

See DOT Code 313.361-030.

In rebuttal, Pietro D’Abbraccio, an Italian cook of 25 years, chef of Tulipano Nero Restaurant, submitted an affidavit. (AF 20). Mr. D’Abbraccio attests that many of the dishes on Employer’s menu are fundamental to Italian cooking and require experience. He describes why it is important for an Italian cook to be able to make sauces from scratch, using fresh ingredients, and to improvise when necessary. *Id.* Because of these requirements, he concludes that at least two years of experience in the field of Italian cooking is absolutely necessary to qualify someone to cook parmigiana dishes, soups, antipastos, lasagne, manicotti and other Italian dishes. *Id.* Mr. Benito Criniti, a cook of 25 years, also submitted an affidavit, which made contentions similar to the ones submitted by Mr. D’Abbraccio. (AF 21).

Employer’s counsel also submitted a brief which stated that Italian cooking is not as easy as the CO makes it out to be. (AF 12-18). Counsel listed several references that provide recipes for making pasta from scratch, parmigiana dishes and other Italian specialties. In contrast to the CO, Employer contends that Foreign Specialty Cook is the appropriate title for the position offered.

In the Final Determination (FD), the CO held to its earlier finding that the requirements for the position offered were unduly restrictive. (AF 9-10). The CO stated that the application had been correctly reclassified. Therefore, the experience requirement for the position exceeded that mandated by the DOT. Accordingly, the CO denied the application and cited it as violating 20 C.F.R. §656.21 (b)(2).

Subsequently, Employer requested review of the CO’s FD pursuant to 20 C.F.R. 656.26. This request included a brief that addressed three points. (AF 1-8). First, Employer argued that the CO failed to accord due weight and consideration to the evidence submitted by Employer in response to the NOF. Second, Employer argued that the CO erred in reclassifying the position on the ETA forms from “Cook, Foreign Specialty” to “Cook, Specialty” and charging Employer with an unduly restrictive job requirement when the evidence supports a finding that the original classification was correct. Last, the CO erred in failing to include instructions as to how the employer could cure the alleged defects in its application; thereby depriving it of due process.

DISCUSSION

Typically, the NOF must specify what the employer must show to rebut or cure the CO’s findings; otherwise the employer is deprived of a full opportunity to rebut. *Potomac Foods, Inc.*, 93-INA-309; *Peter Hsieh*, 88-INA-540 (Nov. 30, 1989) (NOF did not state how to rebut). However, an employer’s treatment of an issue in its rebuttal may be one indication that the NOF provided adequate notice. *See Anderson-MRAZ Design*, 90-INA-142 (May 30, 1991).

In this case, the record indicates that employer interpreted the NOF and made reasonable efforts to rebut. Upon review of the entire file, however, we agree with the CO. Employer’s menu clearly establishes that the business is primarily a pizza and sandwich shop, and that preparation of the menu items does not correspond with the duties of a “Cook, Specialty Foreign

Food.”

Accordingly, the following order shall issue.

ORDER

The Certifying Officer’s denial of labor certification is hereby AFFIRMED.

SO ORDERED.

For the panel:

John M. Vittone
Chairman to the Board of
Alien Labor Certification Appeals,
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.